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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-319

LARRY E. CLARK and J. ELLIOTT KNOLL,

Petitioners,

vs.

UNITED BANK of DENVER NATIONAL ASSOCIATION, UNITED BANKS of COLORADO, INC., and UNITED BANK of FORT COLLINS NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATUTES AND RULES INVOLVED

This Court is asked to determine the applicability of §§1 & 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 & 2, §§11(b) & 106(b) of the Bank Holding Company Act of 1956, 12 U.S.C. §§1849(b) & 1972, and also whether Rules 56 & 52(a) of the Federal Rules of Civil Procedure were complied with in granting summary judgment. The texts of 12 U.S.C. §§1849(b) & 1972 are set out in Appendix A.

QUESTIONS PRESENTED

The statement in the petition of "Questions Presented" is based upon an erroneous reading of the Federal Rules of Civil Procedure, namely:

(a) Petitioners assume that Rule 56 is not applicable to antitrust actions.

(b) They ignore the provisions of Rule 52(a).

Following is a correct statement of the "Questions Presented."

1. Did the District Court and the Court of Appeals correctly conclude, based on the record in this case, that there were no genuinely disputed issues of fact material to petitioners' antitrust claims?

2. Did the District Court and the Court of Appeals properly apply the substantive law to the undisputed material facts in respectively granting and affirming respondents' motion for summary judgment?

STATEMENT OF THE CASE

A. Background

In 1967 petitioners ("Clark and Knoll") decided to attempt to acquire The Poudre Valley National Bank ("The Poudre")*, Fort Collins, Colorado. Most of its capital stock was owned by Flour Mills of America, Inc. ("Flour Mills"). Petitioners had no banking experience and inadequate capital. They applied to respondent United Bank of Denver National Association ("United Bank") for a loan of $2,500,000 to $3,000,000 to finance the proposed purchase.

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*Petitioners erroneously refer in their petition to United Bank of Fort Collins National Association (formerly The Poudre) as a nominal party. United Bank of Fort Collins was dismissed as a defendant in this action by order of the District Court dated May 3, 1971 and with agreement of all parties.

United Bank established loan conditions commensurate with the perceived credit risk but petitioners did not meet them. Some months after petitioners had terminated their negotiations with Flour Mills and their contact with United Bank, respondent United Banks of Colorado, Inc. ("Bancorporation"), a registered bank holding company, commenced negotiations with Flour Mills for the purchase of The Poudre. Bancorporation was and is the parent of United Bank.

These negotiations culminated in a written agreement dated March 28, 1968, by which Bancorporation agreed to purchase from Flour Mills 81% of the capital stock of The Poudre. By order dated March 24, 1969, the Board of Governors of the Federal Reserve System approved the acquisition and The Poudre became a subsidiary of Bancorporation.

Some three years after the purchase agreement was made public, and two years after the Federal Reserve Board's approval, petitioners filed this action.

Petitioners generally claim in their amended complaint that Bancorporation's acquisition of The Poudre wrongfully deprived them of an opportunity to purchase The Poudre. The gravamen of their amended complaint is that Bancorporation was negotiating with Flour Mills for the acquisition of The Poudre stock while petitioners were at the same time attempting to obtain financing from United Bank for the purchase of the same stock. Petitioner Clark in his deposition summarized the complaint succinctly: "They [Bancorporation] had no right to negotiate while we were interested in this bank [The Poudre]." (App., Clark Deposition, p. 130.)

The undisputed facts, as shown by petitioners' own documents and testimony and by that of their witness Jack N. Greenman (president of Flour Mills), are (1) that Bancorporation was *not* negotiating with Flour Mills during the

period when Clark and Knoll were negotiating; and (2) that after Clark and Knoll ceased negotiating with Flour Mills for The Poudre stock, two other prospective purchasers followed (first Avien, Inc. and then The First National Bank of Denver) *before* the negotiations commenced between Flour Mills and Bancorporation in February, 1968.

B. The Undisputed Chronology and Facts

Each of the following is undisputed and supported by sworn deposition testimony (often of the petitioners themselves), by correspondence and other deposition exhibits, the authenticity of which has been admitted, and as to one event and several documents by unchallenged and uncontroverted affidavits. The great bulk of the evidence is in the form of oral deposition testimony of six witnesses and authenticated documents. This was *not* a "trial by affidavit" as petitioners claim (Pet., p. 9).

In February, 1967 Clark and Knoll learned that the controlling stock interest of The Poudre was for sale and contacted Flour Mills. Clark and Knoll admit that there was no agreement on price or other terms and no meetings with the responsible officials of Flour Mills until September, 1967.

On February 7, 1967 Clark and Knoll met with a vice president of United Bank to discuss a $2,500,000 to $3,000,000 loan to finance a proposed acquisition of The Poudre. Petitioners presented various financing proposals to United Bank and the loan negotiations continued through late September, 1967. The loan was never approved by United Bank because of concern about petitioners' lack of banking experience and their apparent inability to repay the loan. In order to improve the repayment prospects for the proposed loan, United Bank required Clark and Knoll to involve other participants in their proposed acquisition and loan. Although this condition was never met United Bank

continued to work with Clark and Knoll through September, 1967.

On August 10, 1967 Clark and Knoll met with Mr. Roger D. Knight, Jr., Chairman of the Board of Bancorporation, to ascertain if Bancorporation had any interest in acquiring The Poudre. Knight told petitioners that he was not seeking to acquire The Poudre but (because he was at that time negotiating for the acquisition of another Fort Collins bank), he told them that "at any time, at any given time, we [Bancorporation] could end up with a bank any place in the State of Colorado." (App., Knight Deposition, p. 26.) Knight committed not to negotiate for The Poudre as long as Clark and Knoll were negotiating — a commitment which was kept.

Greenman's testimony and correspondence establish that it wasn't until December, 1967 that Knight first contacted Flour Mills to see if The Poudre was for sale. And, as stated, there were no Flour Mills-Bancorporation negotiations until February, 1968.

In September, 1967 Clark and Knoll for the first time met with officials of Flour Mills for the purpose of negotiating for The Poudre stock. No agreement was consummated. In their oral depositions Clark and Knoll testified that they contacted Avien, Inc. on September 27, 1967 to ascertain if it had any interest in acquiring The Poudre stock and indicated that their involvement thereafter would be only as brokers.

Petitioners have failed to mention their involvement with Avien, presumably because the fact of Avien's involvement as principal contradicts their claim of competing negotiations between them and Bancorporation.

On October 10, 1967 Clark and Knoll, together with the president of Avien, again met with Flour Mills' representa-

tives. The net result of this meeting was an oral agreement that Avien would purchase the stock of The Poudre from Flour Mills. This agreement was never consummated. Petitioners' own correspondence is conclusive of the fact that in October, 1967 Clark and Knoll abandoned their own efforts to acquire The Poudre.

At no time after October 10, 1967 did petitioners actively negotiate with Flour Mills for the purchase of The Poudre stock. Their role changed at that point from that of principals to brokers. On October 27, 1967 petitioners, on behalf of Avien, made a loan application to United Bank, the proceeds to be used by Avien to purchase The Poudre. Avien's loan application was formally rejected by United Bank on November 3, 1967 for banking reasons.

After October 27, 1967 there was no contact between petitioners and United Bank concerning any loan to them for the purchase of The Poudre. And petitioners further admitted in their depositions that their last contact with United Bank on behalf of Avien was approximately November 6, 1967.

After the Avien loan proposal was rejected, Clark and Knoll contacted other persons in an attempt to broker or interest them in The Poudre but did not inform United Bank of any of these contacts. At no time were Clark and Knoll authorized by Flour Mills to act as its broker.

On December 5, 1967 Mr. Knight of Bancorporation contacted Mr. Greenman of Flour Mills to ascertain if the latter was interested in selling its Poudre stock. Greenman advised Knight that Flour Mills was then negotiating with another party and would not negotiate with Bancorporation while those negotiations were pending. Greenman testified without qualification that he did not negotiate with Bancorporation at any of the times he was negotiating with earlier

interested purchasers: the First National, and before it Avien, and before Avien, Clark and Knoll.

On February 9, 1968 Greenman telephoned Knight and advised that Flour Mills' prior negotiations had not been successful and that he was now free to negotiate with Bancorporation. The negotiations that followed led to the signing of the purchase agreement on March 28, 1968 and the ultimate acquisition of The Poudre by Bancorporation.

ARGUMENT

A. Certiorari Should Be Denied

(1) Petitioners are asking this Court to analyze the record and to find disputes on issues of material fact where the lower courts found none. A third review of the facts would serve no purpose.

(2) The antitrust issues raised by petitioners are neither novel nor unique. The decisions of the courts below are neither in conflict with the decisions of this Court nor with the decisions of any United States Court of Appeals.

(3) There is no basis for petitioners' assertion that Rule 56 of the Federal Rules of Civil Procedure was incorrectly applied by the lower courts. Petitioners claim on the one hand that the District Court erred in failing to make findings of fact and conclusions of law. On the other hand they claim that the Court of Appeals erred when it incorporated in its affirming judgment findings of fact and conclusions of law. Rule 52(a), Fed. R. Civ. P., disposes of both claims.

B. Summary Judgment Was Proper

A trial court's duty on a motion for summary judgment under Rule 56, Fed. R. Civ. P., is "to determine whether there is any genuine issue of material fact in dispute, and, if

not, to render judgment in accordance with the law as applied to the established facts. . . ." 6 Moore, *Federal Practice* §56.11(1), p. 2143 (1968). An appellate court in reviewing the grant of summary judgment has an identical burden. 6 Moore, *Federal Practice* §56.27(1) (1968).

The District Court, after reviewing the record and the briefs, granted respondents' motion for summary judgment on the two federal claims* and, additionally, on its own motion, dismissed these claims for failure to state a claim for relief (Ex., Proceedings Before the Court on Motions, pp. 13-14). At the commencement of the hearing on respondents' motion, the Honorable Fred M. Winner said:

> ". . . Let me advise counsel, I am familiar with the file and, incredible as it may seem, I have read the briefs, which I might add are monumental but at least I have read them, so you may go forward." *Id.*, p. 12.

Petitioners then filed a motion to amend the judgment and attempted to persuade the District Court to delete the summary judgment portion and to simply dismiss the amended complaint for failure to state a federal cause of action. At the hearing on this motion petitioners repeatedly asked Judge Winner to state on the record "that the Court didn't look at affidavits and determine whether or not there were disputed issues of fact. . . ." (Ex., Proceeding Before the Court on Motion to Amend Summary Judgment, p. 8.) The Court refused to vacate its summary judgment, denied petitioners' motion and with regard to whether there were disputed issues of fact, emphatically stated that "[m]y job was to decide whether there were genuine issues as to material fact necessary to the determination of the summary judgment motion, and that's all I did." (*Id.*, p. 7.)

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*Petitioners have abandoned their securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934.

There can be no question that the District Court understood and properly carried out its judicial duty on the summary judgment motion. The Court of Appeals in its opinion repeatedly refers to the "extensive depositions and record" and "deposition exhibits" available to the trial court, and after examining and relating the record to each element of petitioners' claims, concluded that there were no genuine issues as to material facts and that summary judgment was proper.

Petitioners' plea, that it was wrong for the District Court to grant summary judgment, is inconsistent with their own trial court motion for partial summary judgment which reads in part as follows:

> "Plaintiffs request that this Court determine as a matter of law that Defendants have violated the Sherman and Clayton Acts as alleged in the Fifth Claim for Relief.
>
> "No summary judgment is sought as to the amount of damages, nor is summary judgment sought *on the other claims for relief*, for these matters depend upon disputed facts.
>
> "This Motion for Partial Summary Judgment is based upon the depositions, the affidavits, the responses to requests for admissions and the statements in Defendants' Memorandum Brief now filed." (Emphasis added.)

Petitioners infer that there was something improper in the District Court's dismissal, on its own motion, of their federal claims. The record shows that the trial court first granted respondents' summary judgment motion. The Court then ruled that as a matter of law there was no federal cause of action stated in the amended complaint. That in no way affected the summary judgment. Petitioners made no attempt to amend further their amended complaint.

Petitioners now suggest that they had a right to have the District Court's order "clarified" so that they might know just why their amended complaint or their evidence was insufficient to take their case to trial. They infer that the District Court committed error in refusing to give any reasons for its actions. A trial court hearing a summary judgment motion does not adjudicate fact issues, it simply determines whether there is any genuine dispute as to the material facts and, if none, applies the law to those facts. The record is clear that this is exactly what Judge Winner did. Rule 52(a) of the Federal Rules of Civil Procedure provides that: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...."

Furthermore, the District Court did grant petitioners time to file a second amended complaint. Petitioners' contention that the District Court never told them just what was wanting in their amended complaint does not constitute error.

C. Summary Judgment In Antitrust Actions

Petitioners take the position that summary judgment is inappropriate for antitrust claims. Further, they cavalierly assert that:

> "... in the past decade no federal appeals court has ever really sustained summary judgment for an antitrust defendant. When a court of appeals has done so, this Court has uniformly granted certiorari and reversed." (Pet., p. 14.)

Petitioners choose to ignore this Court's decisions in *Associated Press v. United States,* 326 U.S. 1 (1945); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *United States v. United States Gypsum Co.,* 340 U.S. 76 (1950). Those were antitrust actions brought by the gov-

ernment in which this Court held that summary judgment may properly be granted where the record is adequate and there is no triable issue of fact.

The same principles apply to private antitrust actions. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), this Court affirmed a summary judgment motion for a defendant in a treble-damage antitrust action and in doing so stated:

> "To the extent that petitioners' burden of proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *Id.*, pp. 289-90.

If petitioners are now so certain that summary judgment is inappropriate for antitrust claims, *why did they themselves move for summary judgment* on their antitrust claim? Apparently their position is that in antitrust actions summary judgment is available to plaintiffs but never to defendants. Such an argument denies itself. It is contrary to both the letter and the spirit of the Federal Rules. Petitioners may be versatile but they are not consistent. Compare, for example, petitioners' position here with the one they took in their Reply Brief in the Court of Appeals:

> "United Bank of Denver and the Holding Company cite this Court's decision in *H. B. Zachary Co. v. O'Brien,* 10th Cir., 378 F.2d 423 (1967). That case says only that where both sides move for summary judgment, it may be *'inferred'* that both sides admit that there are no questions of fact remaining which necessitate further proceedings. Such an inference is hardly proper here, where Plaintiffs moved for only partial summary judgment with respect to only one of their antitrust causes of action."

The record clearly marks out the events upon which Clark and Knoll base their antitrust claims. Any dispute as to the facts of those events is created solely by petitioners' misleading (or careless) assertions, argument and innuendo. The Tenth Circuit Court of Appeals has accurately described the procedure to be followed, namely that "facts alleged in a complaint may be pierced by discovery and that the pleader may not rest upon such allegations to perpetuate a nonexistent fact." *Shehi v. Southwestern Bell Telephone Co.,* 382 F.2d 627, 628 (10th Cir. 1967). Indeed a primary function of the summary judgment procedure is to allow information gleaned on discovery to pierce unsupported allegations of fact and, where no material factual dispute exists, to advance the cause of justice without resort to time consuming and expensive litigation. *Hilton v. Triangle Publications, Inc.,* 27 F.R.D. 468, 470 (S.D. N.Y. 1961). See also 6 Moore, *Federal Practice* §56.04(1) (1968).

Respondents acknowledge that antitrust claims are often of such a nature that motions for summary judgment should be viewed most cautiously by the trial court. However, "[i]f the record is adequate [in an antitrust case] and it establishes that there is no triable issue of fact, summary judgment should go to the party entitled to judgment under applicable

legal principles." 6 Moore, *Federal Practice* §56.17(5), pp. 2496-97 (1968). See also *Hilton, supra.*

The extensive discovery pursued in this case shows that there is "no genuine issue as to any material fact" as to whether United Bank's decision not to approve Clark and Knoll's loan application was anything more than the exercise of sound business judgment. Petitioners admitted in the District Court that this is the essence of their complaint against United Bank (Ex., Proceedings Before the Court on Motions, p. 10). Nor is there any genuine fact issue regarding petitioners' allegation that Bancorporation was secretly, or otherwise, competing with Clark and Knoll for the acquisition of The Poudre. All of the sworn testimony and authenticated exhibits show that it was not.

In reviewing a trial court's summary judgment, "[t]he questions for consideration are whether the record before the trial Court presented a disputed issue of fact . . . and, if so, whether there were disputed issues needing resolution to determine whether appellants were entitled to recover against the defendants." *Coleman v. Mountain Mesa Uranium Corp.*, 240 F.2d 12, 13 (10th Cir. 1956). The Court of Appeals correctly determined in this case that "in view of the extensive depositions and deposition exhibits available to the trial court, that summary judgment was proper in this situation." (Pet., App. B, pp. 32-33.)

Petitioners maintain that by analyzing and determining the material facts to be undisputed, ". . . the Court of Appeals has decided a question of federal antitrust law and of procedure in a way sharply in conflict with the applicable decisions of this Court." (Pet., p. 8.) As noted above, the burden of an appellate court on an appeal of a summary judgment is identical with that of the trial court. It has a duty to analyze the evidence to ascertain if there is any

genuine issue of material fact. Indeed, petitioners later contradict themselves and admit that the Court of Appeals was "compelled to search the record to determine if there were disputed issues of a material fact." (Pet., p. 11.)

D. Petitioners' Antitrust Claims — The Substantive Law

(1) The Alleged Refusal To Deal

Petitioners characterize United Bank's refusal to make the requested loan as a refusal to deal. (Pet., p. 11.) Yet Clark admitted in his sworn deposition that he believed their loan request was never denied by the United Bank. (App., Clark Deposition, p. 124.)

The petition refers to a memorandum prepared by an employee of United Bank (summarizing the first meeting between Clark and Knoll and United Bank) as evidence of concert between United Bank and Bancorporation. The memorandum concludes with the statement that "at some point in the future our holding company *may be* interested in acquiring *a* bank in Fort Collins. Again, there is nothing concrete here but certainly the possibility does exist"; and "this request *perhaps* has some real merit and could result in a very profitable and important relationship [a correspondent bank] in an area where we presently have none." (Ex., Deposition Ex. K, p. 4, emphasis added.) When read in the context of the entire memorandum, the statement can hardly be said to support petitioners' conclusion that the United Bank's loan decision was affected by whether Bancorporation might ultimately become interested in entering the Fort Collins market.

United Bank wanted to make the loan and obtain a correspondent in Fort Collins but was never convinced of petitioners' ability to repay because (1) their combined net

worth was considerably less than the amount of the requested loan; and therefore (2) assurance of repayment of the loan would depend upon the earnings of The Poudre which, particularly in view of the total lack of banking experience of Clark and Knoll, might have been inadequate to service the debt.

Petitioners complain that the opinion of the Court of Appeals "makes it mandatory for a plaintiff alleging an unlawful joint refusal to deal to show some sort of direct admission that the purpose was specifically to further a monopoly." (Pet., p. 14.) This is petitioners' misinterpretation of the Court of Appeals' conclusion that there is nothing in the record to "indicate or infer" that denial of the loan was motivated by other than sound business considerations. (Pet., App. B, p. 28.) The Court was not requiring an admission but merely evidence which would point to the existence of a disputed fact.

The antitrust laws do not preclude a bank from exercising its independent discretion as to parties with whom it will deal. In *First National Bank of Arizona, supra,* the essence of the complaint was that the defendant bank refused to follow through on its original substantial interest in dealing with the plaintiff. This Court affirmed a summary judgment where the record of the discovery proceedings contained an overwhelming amount of evidence showing that defendants' failure to deal with plaintiffs resulted from "a whole variety of non-conspiratorial motives involving the exercise of business judgment as to the attractiveness of the opportunity offered by petitioner." (*Id.*, p. 277.)

In this case United Bank evaluated the credit risks and very early in the negotiations with Clark and Knoll set reasonable conditions on the granting of the loan — conditions which Clark and Knoll admit they never met. (App., Clark

Deposition, p. 124.) Clark and Knoll attempted to fulfill the conditions but later contended that United Bank and Bancorporation violated §1 of the Sherman Act by conspiring to refuse to deal with them. The essence of this allegation of petitioners is that Bancorporation was working through United Bank to hold Clark and Knoll in fruitless loan negotiations while Bancorporation itself went behind them and bought The Poudre stock. The time sequence of Bancorporation's interest in, and action toward, acquiring The Poudre has been summarized above in the Statement of the Case.

The undisputed facts show that there was neither (1) a refusal to deal nor (2) any concert of action between Bancorporation and United Bank. It is axiomatic that in the absence of a refusal to deal even the alleged concerted action would be without legal effect.

(2) The Alleged Attempt To Monopolize

Clark and Knoll allege in their amended complaint that Bancorporation violated Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1 and 2) by attempting to establish and by "establishing a monopoly in Fort Collins and Larimer County and the State of Colorado and surrounding states and interstate commerce," and by eliminating plaintiffs as potential entrants to commercial banking in Fort Collins and "throughout the United States" (Ex., Amended Complaint, pp. 13-14.)

(a) The Bank Holding Company Act of 1956

So far as Section 1 of the Sherman Act is concerned, Clark and Knoll are precluded from bringing an action under it by virtue of 12 U.S.C. §1849(b) which specifically provides that:

> "Upon the consummation of an acquisition . . . in compliance with this chapter and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if no such litigation is commenced therein, *the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws* other than Section 2 of Title 15. . . ." (Emphasis added.)

The period described by that section is thirty days from the date of the Federal Reserve Board's approval. This action was commenced almost two years after the Board's approval.

(b) **No Claim Under Section 2**

Petitioners complain that Bancorporation's acquisition of The Poudre is an attempt to monopolize in violation of Section 2 of the Sherman Act. In order to fall within Section 2, however, the monopolist must have *both* the power, and the intent, to monopolize. *United States v. Aluminum Company of America*, 148 F.2d 416, 432 (2d. Cir. 1945). Bancorporation lacked both the power and the intent.

Monopoly power is the power to control prices in a market or to exclude competition from a market. *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

At the end of 1967 Bancorporation was the second largest Colorado-based banking organization. Its affiliates held 21.2% of the state's deposits. Bancorporation's acquisition of The Poudre increased its share of Colorado business by only 1.1%. The Poudre, having only 34% of Fort Collins'

deposits, was a poor second to the First National Bank of Fort Collins *(Polk's Bank Directory* 1969). These basic statistics alone are conclusive of the fact that acquisition of The Poudre did not create dominance or enhance any power to exclude competition from or control prices in any relevant market. This was the March 24, 1969 decision of the Board of Governors of the Federal Reserve System, which order concluded:

> "Consummation of the proposal would not result in a monopoly or be in furtherance of any combination, conspiracy or attempt to monopolize, nor would it substantially lessen competition, tend to create a monopoly, or restrain trade in any section of the country." (Ex., Statement to Order Approving Application Under Bank Holding Company Act, p. 4.)

Significantly, the Department of Justice did not challenge the Board's decision.

Petitioners contend that Bancorporation's acquisition of The Poudre had an adverse effect on competition and point to Governor Robertson's lone dissent to the Federal Reserve Board's approval order as evidence of a "disputed issue of fact" (Pet., p. 16). Governor Robertson was concerned with the competitive effects of the acquisition only from the standpoint of the banking public and not of a potential purchaser. His remarks cannot be construed to benefit Clark and Knoll who claim to have been competing with Bancorporation for The Poudre. Bancorporation's acquisition of The Poudre vis-a-vis Clark and Knoll is not the type of anticompetitive effect the Federal Reserve Board is bound by statute to consider when it receives an acquisition application. It is not the type of anticompetitive effect which is the thrust of the antitrust laws. To hold otherwise would

mean that every time a bank or any other business is sold to A instead of B there is a probable violation of the law.

Petitioners interpret the decision of the Court of Appeals as requiring of petitioners "uncontradicted evidence that the defendants did *not* have an 'intention to enter the . . . banking market only by acquiring an existing [bank] as a subsidiary' " (Pet., p. 15). In so stating the petitioners have twisted and taken out of context the words of the Court of Appeals appearing in Appendix B to the Petition at page 32 thereof. For example, the sentence of the opinion from which petitioners have extracted reads:

> ". . . In addition to these objective factors which make the Holding Company's influx into the Fort Collins area impractical, the internal documents of the Holding Company consistently show their intention to enter Fort Collins banking market only by acquiring an existing bank as a subsidiary." (Pet., p. 32.)

(3) **Potential Competition**

In their argument petitioners attempt to inject the theory of potential competition by asserting that Bancorporation and United Bank somehow eliminated Clark and Knoll as potential entrants to commercial banking in Fort Collins. This is, of course, an absurd interpretation of the potential competition theory. Further, the potential competition concept is relevant only in a Clayton Act context whereas here the petition limits the issues on review to the Sherman Act.

Petitioners similarly suggest that Bancorporation's acquisition of The Poudre is illegal because it removed Bancorporation as a potential *de novo* entrant into the Fort Collins banking market. Petitioners have no standing to as-

sert a potential competition claim. Clark and Knoll are presumably aggrieved because they were unable either to purchase The Poudre or to obtain a finder's fee by involving themselves in the sale of The Poudre stock. But such a grievance is totally unrelated to the issue of whether Bancorporation's acquisition of The Poudre substantially lessened potential competition between Bancorporation and The Poudre. The Federal Reserve Board in approving, and the Justice Department in declining to challenge the acquisition concluded that the acquisition of The Poudre by Bancorporation did not substantially lessen actual or potential competition. And, as stated, the 30-day statute of limitations under 12 U.S.C. §1849(b) expired long prior to commencement of petitioners' action.

(4) The Alleged Tying Violation

Notwithstanding that their request for review excludes reference to the alleged tying violation (Pet., p. 2), petitioners in their argument take issue with the manner in which the Court of Appeals disposed of that allegation. Suffice to say that in any event no tie was consummated and the undisputed facts preclude petitioners from establishing the essential elements of a tying violation under §1 of the Sherman Antitrust Act.

In *Time-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), this Court defined the elements of an illegal tying arrangement:

> "When the seller enjoys a monopolistic position in the market for the 'tying' product or if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrow standards expressed in §3 of the Clayton Act. . . . A tying arrangement is banned by §1 of

> the Sherman Act whenever both conditions are met" (*Id.* at 608-09.)

Nothing in the record indicates that United Bank had sufficient economic power in the credit market to coerce Clark and Knoll into accepting an allegedly undesirable correspondent bank relationship, or that the resulting effect of the alleged tie would substantially restrain commerce. There is no way that Clark and Knoll could ever establish that a substantial volume of commerce in the "tied product," i.e., acting as a repository for correspondent bank balances of The Poudre, was restrained and that United Bank had sufficient economic power over the market in the "tying product" ($3,000,000 loans) to coerce buyers of that tying product into accepting the tying conditions.

(a) No Dominant Market Position in the Tying Product

Clark and Knoll cannot seriously allege that United Bank has or had sufficient economic power over the market in the tying product, i.e., $3,000,000 loans, to enjoy a "monopolistic position." Clark and Knoll assert that United Bank was one of two institutions in Colorado able to make the loan (Pet., p. 11). This statement is misleading in two respects. First, it implies that Clark and Knoll were somehow precluded from going to out-of-state lenders and secondly, it discounts the probability of a loan participation between two or more lenders, in or outside of Colorado. At June 30, 1969 there were 100 banks in the United States with loan limits over $3,000,000 (*Polk's Bank Directory* 1969). The fact that Clark and Knoll did not apply to The First National Bank of Denver or seek a loan outside of Colorado, suggests that they well knew that their problem was not a result of the United Bank's economic power (or refusal to deal) but their own apparent inability to repay the loan,

which made their loan proposal an unreasonable credit risk for any bank or group of banks.

(b) No Tying Arrangement Consummated

Petitioners rely heavily on *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) wherein a subsidiary of U. S. Steel provided a 100% financing loan to Fortner for the purchase of prefab housing from U. S. Steel at a price of $400 per house higher than the market. That case is easily distinguishable from the facts in the present case. Unlike *Fortner*, a tying arrangement was never consummated.

Petitioners fail to cite a single case where an attempt to tie resulted in civil liability.

As discussed above, another important distinction from *Fortner* is that there is no evidence to support petitioners' assertion that United Bank had sufficient economic power over the tying product to appreciably restrain the tied product. Argument is not a substitute for facts and evidence. Unlike the $400 differential in U. S. Steel's prices, there was nothing unusual in the terms of the proposed correspondent banking arrangement to suggest that United Bank had such power over the loan market that it could command a uniquely advantageous correspondent banking relationship.

Petitioners infer that the courts should condemn the practice of banks requiring compensating balances as an incident of loans and the practice of one bank maintaining a demand deposit at another bank. But, correspondent banking is an integral part of the banking structure of the United States. The 1970 amendments to the Bank Holding Company Act of 1956 added §106(b) to prohibit tie-ins of products and services offered by banks and bank holding companies, without proof of actual competitive injury. But the amend-

ment contains a specific exception for traditional banking arrangements such as requiring compensating balances as partial consideration for a loan (12 U.S.C. §1972).

CONCLUSION

Petitioners seek certiorari on the grounds that the antitrust issues alleged in their amended complaint were decided in conflict with this Court's decisions and that their case presents important questions of law which "have not yet been, but ought to be decided by this Court." (Pet., p. 9.) Their petition fails to support either ground.

In addition they allege the impropriety of summary judgment. The antitrust and other issues in this case, where the record is unusually complete, were as ripe for summary judgment as any issues can be. The District Court and the Court of Appeals willingly accepted and carefully and painstakingly fulfilled their respective judicial responsibilities.

Respectfully submitted,

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APPENDIX A

Sections 1849(b) & 1972 of the Bank Holding Company Act of 1966 provide:

§1849(b)

The Board shall immediately notify the Attorney General of any approval by it pursuant to section 1842 of this title of a proposed acquisition, merger, or consolidation transaction, and such transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under section 1842 of this title shall be commenced within such thirty-day period. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented. In any judicial proceeding attacking any acquisition, merger, or consolidation transaction approved pursuant to section 1842 of this title on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the Board is directed to apply under section 1842 of this title. Upon the consummation of an acquisition, merger, or consolidation transaction approved under section 1842 of this title in compliance with this chapter and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if

no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, but nothing in this chapter shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction.

§1972

A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(1) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(2) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(4) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(5) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.